

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
FREEMAN, : Docket #22cv2435  
Plaintiff, :  
- against - :  
DEEBS-ELKENANEY, et al., : New York, New York  
Defendants. : September 15, 2022  
----- :

PROCEEDINGS BEFORE  
THE HONORABLE SARAH NETBURN,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: CSREEDER, PC  
BY: MARK PASSIN, ESQ.  
11766 Wilshire Boulevard, Suite 1470  
Los Angeles, California 90025

REITLER KAILAS & ROSENBLATT LLP  
BY: BRETT VAN BENTHUSEN, ESQ.  
885 Third Avenue, 20th Floor  
New York, New York 10022

For Prospect Agency and Kim : KLARIS LAW, PLLC  
BY: LANCE KOONCE, ESQ.  
ZACHARY PRESS, ESQ.  
29 Little West 12th Street  
New York, New York 10010

Transcription Service: Carole Ludwig, *Transcription Services*  
155 East Fourth Street #3C  
New York, New York 10009  
Phone: (212) 420-0771  
Email: Transcription420@aol.com

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APPEARANCES CONTINUED:

For Deeks-Elkenaney,  
Entangled Publishing,  
Other Publishers and  
Universal:

COWEN, DEBAETS, ABRAHAMS & SHEPPARD  
BY: BENJAMIN HALPERIN, ESQ.  
CECE COLE, ESQ.  
41 Madison Avenue, 38<sup>th</sup> floor  
New York, New York 10010

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
None				

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

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THE COURT: -- everybody, this is Judge Netburn.

This case is Freeman v. Deebbs-Elkenaney, et al. The docket number is 22cv2435. Can I ask counsel for the plaintiff to state their appearance.

MR. MARK PASSIN: Good afternoon, Your Honor, Mark Passin. I thank the Court for accommodating my request to attend by telephone.

THE COURT: Welcome.

MR. BRETT VAN BENTHUSEN: Brett Van Bentyhsen from Reitler Kailas & Rosenblatt as local counsel for plaintiff is also on. Good afternoon, Your Honor.

THE COURT: Good afternoon. And on behalf of Prospect Agency and defendant Kim.

MR. LANCE KOONCE: Good afternoon, Your Honor, Lance Koonce with Klaris Law, and I believe on the phone with me is Zach Press from Klaris Law as well.

THE COURT: Thank you. And on behalf of Deebbs-Elkenaney and Entangled Publishing and other publishers and Universal.

MR. BENJAMIN HALPERIN: Good afternoon, Your Honor, this is Benjamin Halperin of the law firm Cowan Benjamin Samuel Halperin Cowen, DeBaets. Als with me is CeCe Cole from the same firm.

THE COURT: Thank you. I hope everybody on the

1 call is healthy and safe. I did want to conduct this  
2 proceeding in person for two reasons. One, I think it's  
3 going to be a longish call, and I tend to prefer that  
4 longer calls go in person. And, secondly, because I am  
5 concerned that the parties are not engaging in effective  
6 meet and confers and that maybe the emailing back and  
7 forth with a few phone calls is preventing the parties  
8 from working through problems on their own. I feel that  
9 doubly having read the submissions from the defendants  
10 that sound like some of the disputes that were raised by  
11 the plaintiff have, in fact, been addressed. So I've  
12 identified what I think are the issues for today. It  
13 seems like they overlap a fair amount between defendants.  
14 So why don't we see if we can clip through them and  
15 address those that remain outstanding.  
16

17 And if I can, I'm recording today's conference.  
18 Can I ask two things: one, that everybody mute their  
19 line unless they're speaking and, two, that you state  
20 your name each and every time you speak. If we do have a  
21 court reporter transcribe the recording, that they know  
22 who to attribute statements.

23 All right, first base, I understand that all  
24 defendants have produced or agreed to produce documents  
25 up until what people are calling the notice dates which I

1  
2 believe is February 2 of 2002 and that they've agreed to  
3 produce further documents later in time that relate to  
4 financial records. That seems like a reasonable approach  
5 to take. I'm happy to hear from plaintiff as to why that  
6 approach is not appropriate.

7 MR. PASSIN: Mark Passin on behalf of  
8 plaintiffs, Your Honor. You know, there could be other  
9 documents. For example, the defendants themselves may  
10 have communicated and it may not be protected by a joint  
11 defense privilege depending on what they say. For  
12 example, they said, you know, we should destroy all  
13 documents, I obviously would be entitled to that. Okay.  
14 So I just think not all the communications necessary  
15 would be privileged.

16 THE COURT: Okay, I think that that's probably  
17 true. A theme of today's conference is that all parties  
18 are going to try this case without having seen every  
19 possible document that they would want to see. That's  
20 just the nature of litigation. And so the possibility  
21 that you might find a communication that says something  
22 as nefarious as we should destroy all of our documents  
23 presumably is earlier documents would include the  
24 exchange of those documents that are then directed to be  
25 destroyed. So I'm not sure the hypothetical that there's

1  
2 some guilty statement made would justify expanding the  
3 scope of discovery beyond the date of both the notice of  
4 the claims but also the publication of the last published  
5 book.

6 MR. PASSIN: Okay, Your Honor. That's fine,  
7 Your Honor.

8 THE COURT: All right, so the dates for the  
9 searches, unless otherwise directed either by the Court  
10 or by an appropriate discovery demand, will be up until  
11 the date of notice which, again, I believe it's some time  
12 in February of 2022, except for financial records which  
13 can be produced later in time.

14 All right, with respect to the search terms, my  
15 read on the letter from Mr. Koonce is that they agreed to  
16 run searches for all of the terms that were proposed.  
17 They examined that hit report, they de-duplicated, they  
18 got rid of privilege, etc., and they produced I think  
19 23,000 pages' worth of documents. I know that with  
20 respect to the Deeks-Elkenaney plaintiffs, defendants, it  
21 appears that the production was only made yesterday.

22 So I assume Mr. Passin hasn't had an opportunity  
23 to review those records yet, but at least with respect to  
24 the searches that, again, I understand were done based on  
25 the terms that plaintiff's counsel provided, what, Mr.

1  
2 Passin, are the objections now with respect to search  
3 terms?

4 MR. PASSIN: Well, I just - look, first of all,  
5 I'm an older lawyer, I just have to say so. Search  
6 terms, you know, is a new thing. But the fact of the  
7 matter is that I just, my client and I both felt search  
8 terms wouldn't pick up everything we need. For example,  
9 again, we're concerned that Ms. Kim and Ms. Wolf  
10 exchanged graphs of my client's manuscript or large  
11 excerpts and we just can't include every word in all  
12 those drafts to make sure we catch them all.

13 Moreover, the search terms do not, you know, I  
14 had that exhibit C which listed a whole bunch of  
15 requests, and I don't think the search terms cover any of  
16 those document requests, and I think those need to be  
17 pulled, certainly if they're not all going to be pulled  
18 by hand, those certainly need to be pulled by hand.

19 THE COURT: Well, let's talk about electronic  
20 documents because, you know, I understand that these  
21 custodians have hundreds of thousands of documents,  
22 email, etc., and so it's not practicable that the parties  
23 could open each one and search them. So that is not a  
24 practice that is conducted. And for what it's worth, I  
25 think many people view the use of assistive technology



1  
2 like using search terms or even more advanced  
3 technologies as better than the sleepy eyed young  
4 associate who has to plow through volumes and volumes of  
5 documents and may miss something.

6           So search terms I think have a real advantage  
7 both because you can rapidly go through a very large  
8 volume of records and because no matter how tired you  
9 are, your computer will find the word that you're  
10 searching for. So I'm not going to direct that the  
11 defendants abandon the benefits of using technology here.

12           My understanding is that you proposed a  
13 significant number of terms and Boolean searches and that  
14 the defendants at least with respect to the Kim and  
15 Prospect defendants did run those terms as you requested,  
16 obtained a very large volume of records, I think it was  
17 something like 440,000 documents were collected based on  
18 those terms. That was then reduced for privilege reasons  
19 and relevancy, which ultimately resulted in the  
20 production of 23,000 documents. So you have a  
21 significant volume of documents. Is there a reason that  
22 you think the search terms that you proposed are not  
23 turning up the types of documents that you think it  
24 should be?

25           MR. PASSIN: Well, first of all, Your Honor,

1 they didn't run all the search terms that I suggested,  
2 and the only reason I gave them any search terms is  
3 because otherwise we weren't going to get anywhere. I  
4 reserved by rights, I said just get me some, get me  
5 documents, search terms I'd like to add. They limited  
6 the number that I could give them. And, secondly, I  
7 don't think it was 400,000 after they ran my search  
8 terms. I think it was 400,000 when they just called the  
9 raw documents. All right. And, again, I don't think any  
10 of the search terms will gather the requests that are set  
11 forth in exhibit C.  
12

13 THE COURT: All right, why don't I ask Mr.  
14 Koonce to tell me the process as it played out on his end  
15 with respect to searches.

16 MR. KOONCE: Thank you, Your Honor. When we  
17 were first, you know, when we first spoke to plaintiff  
18 about producing documents and then received their written  
19 requests, we, you know, we tried to figure out what the  
20 volume would be and how to essentially on our end prove a  
21 negative, which is that there were no communications like  
22 the ones that plaintiff is speculating about. We know  
23 that to be a fact. We talked to our client at length  
24 about this. So this, you know, and in normal copyright  
25 cases this issue of access really comes very secondary to

1 the issue of substantial similarity.

2 But knowing that this is the scenario that  
3 plaintiff has alleged here that there were these  
4 surreptitious emails, what we tried to do is come up with  
5 a strategy that would hopefully be acceptable to  
6 plaintiff to sort of alleviate the concern that things  
7 were, you know, were hidden or missing. So rather than  
8 do searches initially to sort of narrow the scope of what  
9 we pulled, we pulled every single email from Ms. Kim and  
10 her primary email account. She's the owner and the  
11 primary agent. And we've now pulled as well the other  
12 two custodians at Prospect who worked either with  
13 plaintiff, Ms. Freeman, during the few years she was  
14 working with the agency back in the early 2010/2014  
15 timeframe and the agency worked, and assistants who  
16 worked with Ms. Wolf, the defendant here who authored the  
17 Crave series. So we pulled everything.

18 And then we went to plaintiff's counsel and  
19 proposed search terms that would find any communications  
20 from Prospect or to Prospect that mentioned the name of  
21 the manuscripts that Ms. Freeman wrote, her name, her  
22 email addresses, anything we could think of that would  
23 identify an email that might attach or discuss those  
24 works or her that might have been sent to Ms. Wolf or to  
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Entangled although we know that from speaking to our clients we know that didn't happen. But we wanted to be able to prove that negative.

And then the hard part was, well, because plaintiffs speculate that they might have sent excerpts or pieces or something like that, how do you get at that those? So we proposed a series of search terms tied to the parties and to Tracey Wolf (indiscernible) to Liz Pelletier to Entangled, and then some tied to the names of the books. And we proposed a pretty large set of terms of to Mr. Passin. He came back and then proposed, you know, hundreds of terms. We ended up with something well north of a hundred terms that we actually ran, and the original documents we pulled were over 300,000 documents, close to 400, and then when we went through and we did the search terms, we ended up with, out of Ms. Kim's email accounts, over 23,000 and now we've produced another, I can't remember if it's 3,000 or 4,000 from the other agents. And we still have a few more repositories, much smaller, to go through. But that's the process we had followed.

And all along I have said to Mr. Passin that many of the terms that we were using that he insisted on, like single words, two word phrases, that really wouldn't

1  
2 get at what he was looking for. It was going to be  
3 overbroad, things like win-win, my eyes snap open, trust  
4 no one, that, you know, you're dealing with a literary  
5 agency that works in this particular genre, and as a  
6 result we did, a lot of those 23,000 documents are  
7 completely irrelevant documents that relate to other  
8 books and other authors. But to be thorough, that what  
9 we did, that's what he insisted on.

10 I think if we had gone to searching for, you  
11 know, a sentence of ten words, you would've seen that  
12 knocked way, way down just by the way search terms work  
13 and I think to basically nothing. But we did it this way  
14 because that's what they insisted on, and we were trying  
15 to be transparent.

16 THE COURT: So in light of that, Mr. Passin,  
17 what do you think, short of requiring that they go  
18 through every single document by hand which I will not  
19 require them to do, what more do you think needs to be  
20 done? Where are the inadequacies? Alternatively,  
21 (indiscernible) you should say to me would be that based  
22 on the production to date you've received documents that  
23 lead you to believe that there would be other documents.  
24 So not just your rank speculation that these documents  
25 should exist but that some of the produced documents

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illustrate that there's a basis to believe there are other documents that haven't been produced.

MR. PASSIN: Well, first of all, I just want to point out that I did ask Mr. Koonce to run a search of how many documents there were between Ms. Kim and Ms. Wolf so we could see, you know, if that was unmanageable, and he wouldn't do that. So I don't know - I would like that done so I know how many documents those are. Okay.

And, secondly, again, I go back to the ones in exhibit C which will not come up in the search, and I don't know if, he said some stuff he would do manually, some stuff he wouldn't. He never told me exactly what he would. If he's not going to pull all those, then I guess we have to do more search terms. And then I suppose he took out some of my search terms. I'd have to go back and look at those and see if we wouldn't think they should be added.

THE COURT: Well, I think you need to do better than just we want more. Is there, you know, is there a basis, for instance, can you explain to me with some specificity why a particular term that was not run you believe would uniquely capture what you're looking for that might not otherwise have been captured?

MR. PASSIN: Well, because we think it was

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copies and, therefore, if it comes up in one of their documents, the evidence (indiscernible) that it was copied.

THE COURT: I'm not sure I follow you.

MR. PASSIN: Well, it's one of the infringed words.

THE COURT: Sorry --  
(interposing)

THE COURT: Can you repeat your response to me?

MR. PASSIN: It was - you know, we gave them - I have to go back and look and see what he didn't give us and what we took out at the last minute, and I believe some of them were words that were infringed. And so obviously if those words came, were hit, that would be evidence to us to look further to see if there are more infringing words.

THE COURT: Right. I mean, you know, if, for example, you believe that the word red was a word that was in your manuscript and then appeared in the published books and they did not run the word red, but they ran other words and other terms that would have found this transaction, then requiring them to run a word that may appear in multiple types of communications having nothing to do with this case would be unduly burdensome without a

1 lot of benefit.

2  
3 So what I'd like you to do is look at the  
4 production, look at the terms that were run and the  
5 search terms that were excluded, and if you have a basis  
6 to argue that a particular term that was excluded may, in  
7 fact, you know, uniquely hit on a relevant document that  
8 would otherwise have been missed by the search terms that  
9 were run, then you should bring that to Mr. Koonce's  
10 attention and have a discussion with him.

11 It sounds like he proposed - please speak up,  
12 Mr. Koonce, if I misheard you - but that you would run  
13 full sentences which I think would, you know, be very  
14 comprehensive and may return zero hits, of course. And  
15 so what I heard Mr. Koonce say is he didn't think that  
16 was the best way to run the search on, you know, for his  
17 point to clear his client for your point to find the  
18 relevant documents. But you think that there's a passage  
19 that is directly lifted you believe from your client's  
20 manuscript, maybe running a full sentence is the best way  
21 to proceed.

22 MR. PASSIN: Let me talk to my client, and I'll  
23 back to Mr. Koonce. Also, could Mr. Koonce please run  
24 for me and let me know how many emails during the  
25 relevant time period were exchanged between Ms. Kim and



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Ms. Wolf.

THE COURT: Mr. Koonce, is that easy enough for you to day?

MR. KOONCE: I think we can do that. I mean, you know, Ms. Kim and Ms. Wolf, I mean they have a relationship that spans more than a decade now. So that number is going to be a pretty large number, but I can provide that I believe. I don't think I have an objection to doing that. I think the reason we didn't do that before is just because we had not it that way at that point in time. What we've done already though is produced all emails between or all documents that hit on search terms that included Deeks-Elkenaney's name, whether it's Tracey Wolf or her name using her email addresses and a number of terms that Mr. Freeman, excuse me, that Mr. Passin had proposed. So we've done a lot of that, but if it's just a matter of getting the number of times they've emailed each other, I believe we can do that.

Just mentioning the sentences, I just want to just for clarity, my sense is if we run a full sentence from Ms. Freeman's manuscripts, we will then pull up every version and every copy of her manuscripts that are at, were with Prospect or attached to emails back and

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2 forth between Prospect and Ms. Freeman but that they  
3 would not turn up other documents because those, you  
4 know, those words were not transmitted to Ms. Wolf.

5 THE COURT: All right, so I'd like --

6 MR. PASSIN: And, Your Honor, what're we going  
7 to do about the exhibits, the requests which I do not  
8 believe are responsive to word searches? I mean are  
9 those being pulled by hand such as the royalty  
10 statements, the contracts, the various versions of her  
11 books, drafts of her books?

12 THE COURT: I mean I would say if some of these  
13 are specific documents, then I think those should be  
14 produced I mean to the extent that there is an agreement,  
15 for instance, but I think a lot of these also would be  
16 picked up through the search terms, you know, all  
17 documents evidencing are likely, you know, what's being  
18 used to find responsive documents. So I wouldn't direct  
19 the defendants to do a manual search for something like  
20 that request.

21 MR. PASSIN: But what about the royalty  
22 statements and the contracts?

23 MR. KOONCE: Can I just interrupt for a moment  
24 which is we've said, I told Mr. Passin before we're  
25 producing those multiple times and we said it in our

1  
2 responses letter, I mean that is absolutely something  
3 we'll be produced. And I do think that the bulk of the  
4 rest of these will be picked up by the search terms by  
5 definition, but if not, I've told Mr. Passin separately  
6 that to the extent that there are documents that are  
7 individual or subject of a request that would not be  
8 picked up by search terms, we'll produce them unless  
9 we've made an objection to producing them.

10 THE COURT: So let's talk about production. I  
11 think we need to have a deadline for the substantial  
12 completion of paper discovery. Mr. Koonce, when do you  
13 think that will be for you?

14 MR. KOONCE: Your Honor, I believe we should be  
15 able to be done with that production within the next two  
16 to three weeks, maybe sooner, maybe more like two weeks.  
17 I think we've identified almost, I mean we're down to  
18 the, like I said, smaller batches of, you know, smaller  
19 repositories of documents. So we're very near the end.  
20 I think the bulk of the documents have been produced at  
21 this point.

22 THE COURT: All right, and the same question to  
23 you, Mr. Halperin, just, generally speaking, when do you  
24 think you'll be done with substantial production of  
25 documents?

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MR. HALPERIN: Thank you, Your Honor, this is Ben Halperin. We think about three weeks. As we noted in our letter, the dispute over the search terms significantly slowed everything down. We're also doing what we understand to be a more extensive responsiveness review to weed out communications related to totally different books that aren't involved in this case at all by completely different individuals. And that's why our initial volume was lower. But if I had to estimate, I would say about three weeks.

THE COURT: All right, thank you. So what I'd like you to do I think, Mr. Passin, I know you only just got some documents from the Elkenaney defendants yesterday, so you probably haven't had a chance to go through them. I'd like you to go through this documents to go through the production from Mr. Koonce to talk about, you know, to the extent you believe there are search terms that were excluded that would uniquely identify responsive documents, meaning other search terms that were run were not adequate to find these types of documents.

And, again, I think I heard Mr. Koonce suggesting that they could run a full sentence, for example, if you believe the full sentence was listed, it

sounds like at a minimum that will come up with every time your manuscripts traveled through the, you know, internet so to speak and might show a transmission to a defendant or it might just show that it was a back and forth between the plaintiff and Ms. Kim. So if you think that that would be helpful, I think I hear Mr. Koonce saying he's willing to look at that.

Mr. Koonce, I do want you to provide plaintiff with just a hit report on the number of emails between Kim and Wolf during the relevant period. Given what I've heard and what I understand, I suspect that will be a large number, and, again, I'm not inclined to direct a party to do a manual review of large volumes of electronically stored information. And given that the search terms would have picked up those emails with the relevant term, I think you're probably getting what you're going to see, but I want you to continue to meet and confer with the defense counsel on those issues.

I'm going to set the deadline for the substantial completion of fact, sorry, of document discovery as October 7. So that gives the defendants a little over three weeks to complete their production.

Let me jump to interrogatory 3 and 4 because I think it's a good way to segway from this issue about

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individual documents. So certainly to the extent there is an agreement, that needs to be searched for and produced. You know, documents concerning are the types of documents that get pulled from search terms, but a communication, a letter, an agreement, that should be searched for manually and produced.

With respect to interrogatories, I think they're generally three and four, sometimes there are two, having to do with revenue and expenses, I believe that Mr. Koonce indicated in his letter that he would be producing the sort of answer to the interrogatories with respect to revenues and expenses. Is that correct?

MR. KOONCE: Sorry, Your Honor, I was trying to get off of mute. When you say responses, yeah, we will be providing documents responsive to the requests, yes.

THE COURT: And when you say you're providing documents responsive to the requests, you know, to the extent those documents are things like a revenue, I'm sorry, a royalty chart or something where you can pretty easily determine the total revenue because you've got the royalties coming in, that's one thing. To the extent any of these documents require interpretation or even discretion in determining whether or not something is an appropriate expense or not, I don't think that that would

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be a responsive and helpful document. So can you tell me what sorts of documents you intend to provide?

MR. KOONCE: Well, I think generally speaking there will be primarily what we'll be providing are commission statements that, you know, that show the agency commissions. I think not, I'm sorry, I'm not following Your Honor as to documents that would relate to expenses not being helpful. We certainly will provide, I mean I think the commission statements will basically show what the agency, typically agencies just make a certain percentage on sales of a book, and that's what we'll be providing.

THE COURT: I think what I was referring to is, you know, to the extent you would be deducting from gross revenues any expenses (indiscernible) tax purposes or otherwise, I think it would not be helpful or fair to produce your credit card statement or your rent statement and say this is an expense that would partially be attributed to this particular revenue stream. Does that make sense? I mean an expense for, you know, marketing of a book, that's pretty clearly all going to one book, but an expense that is a little bit more vague I think would be more problematic if it was provided without direct clarity.

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MR. KOONCE: Understood, Your Honor. I don't think we have, I've litigated copyright cases for some time, and I think I have a pretty good understanding of what types of expenses can be deducted from gross revenues in order to determine what the profits should be, and our intent would certainly not be to produce anything, I mean unless it's shown in a statement we're producing for other purposes, I think we'd be producing documents showing expenses that aren't related to the books themselves.

THE COURT: All right, Mr. Halperin, I know you had the same response for this category of interrogatories. Is your response the same as Mr. Koonce's now?

MR. HALPERIN: Yes, it is, Your Honor.

THE COURT: Okay. All right, so what I'm going to do --

MR. PASSIN: Your Honor, can I address that, it's Mr. Passin, for one second?

THE COURT: Sure.

MR. PASSIN: Look, I mean the standard is if (indiscernible) the answer will be substantially the same for either party, I mean these parties must have ledgers or something that they keep running totals of these



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things, and it would be, it is not substantially the same for either party to ascertain the answer. They could much more easily than myself just answer the interrogatories by giving me the numbers.

THE COURT: So I understand. That's sort of why I was asking about the types of documents. Why don't we see what the documents are that are produced. If there are five pages of documents with a bottom line number and all you need to do is add that number up, then I think you probably prefer to have the actual documents themselves rather than have them just give you a number because you can look at those documents then.

So why don't you see what's produced. If the production is not sufficiently clear or is going to complicate matters, then I think we can either come back to this issue and ask for a response in the form of an interrogatory or even ask for a request for admission towards the end of discovery.

MR. PASSIN: Okay, thank you, Your Honor.

THE COURT: Okay, so those documents will be subsumed in the October 7 deadline for the substantial completion of discovery.

There was an issue related to email addresses, personal and professional. My interpretation of the

parties' responses is that personal email addresses are being searched, that an email address that the defendants, the Kim and Prospect defendants, allege is the husband's email address, I think unless I have a better reason than what was presented thus far, that should not be produced. And I understand that there are also two email addresses that the plaintiff believes are controlled by the Kim and Prospect defendants that they deny. I'm happy to hear from Mr. Passin what the basis is for his belief, and we can go from there.

MR. PASSIN: Well, Your Honor, you know, we think who has evidence is pretty clear, but if you're not going to accept that, then there's nothing more to say. But I mean it's like, if a house is in someone's name and then they say it's not their house, well, it's in their name, so it's their house.

THE COURT: Can you draw out that analogy for me? How does that apply here?

MR. PASSIN: Well, we gave you two who as reports that shows that that email address that they claim is the husband's is registered in the name of Ms. Kim. So if it's registered in Ms. Kim's name, it's Ms. Kim's email address.

THE COURT: Have you received any documents so

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far in discovery or has your client ever received documents just in her own business transaction with that email address?

MR. PASSIN: Not that I'm aware of, Your Honor. I would have to ask her, but not that I'm aware of.

THE COURT: Okay. I mean my son's phone number is probably in my name, but I don't use my son's phone. So if that's the analogy, I'm not sure it's good enough for me to justify searching this husband's email address.

MR. PASSIN: Your Honor, just so you know, I'm just trying to do the best I can. My client feels very strongly that there has to be emails exchanged and stuff. I'm trying to do my due diligence, you know, and that's what I'm trying to do.

THE COURT: I appreciate that, and, look, if you find a substantive document that suggests that that email was being used for these transactions, you can come back to me, but the evidence you have thus far is not sufficient for me to interfere with this person's privacy rights.

MR. PASSIN: Thank you, Your Honor.

THE COURT: All right, the next question's with respect to the definition of the Crave series, and all defendants object to including unpublished books which

1 are not even alleged to have been infringing since  
2 presumably the plaintiff hasn't even seen them. So  
3 they're not part of the complaint. And so the  
4 defendants' argument, as I understand it, is that there's  
5 not a good enough basis to produce these documents, at  
6 least not now, when you haven't established infringement  
7 with respect to the first four published novels. And  
8 given the heightened business sensitivity of releasing  
9 unpublished manuscripts, there is an objection to the  
10 production. I think that that is the defendants'  
11 positions. What's your response, Mr. Passin?

12 MR. PASSIN: Well, there have been four books  
13 that have been published. We claim all four of them  
14 infringe, all right. We think it's (indiscernible) to  
15 admissible evidence because they're likely to be  
16 infringing as well. For example, they most likely  
17 involve the same characters. The characters are  
18 sufficiently delineated that we feel that in and of  
19 itself would constitute copyright infringement. But for  
20 us to have to go through this lawsuit and if they come  
21 out during the lawsuit and then maybe have to go through  
22 a second or third lawsuit when we could get the  
23 information now seems like a waste of judicial resources.

24 THE COURT: Who from the defense wants to  
25

1  
2 respond?

3 MR. HALPERIN: This is Ben Halperin, I can  
4 respond, Your Honor. So plaintiff already has, you know,  
5 tens of thousands of documents to review based on the  
6 four existing books. If there is any evidence of ripping  
7 off the plaintiff, then we maintain that our books are  
8 not even remotely substantially similar to the  
9 plaintiff's manuscripts and that there was never any  
10 access. It should be visible from all of the years  
11 leading up to when those first four books were published.

12 As Your Honor noted, it would be just  
13 devastating to defendants' business for plot points of  
14 unpublished books to leak at this point. They're widely  
15 popular books, and if there isn't evidence that allows  
16 plaintiff to prove her claims in the existing books,  
17 there's no reason to require that documents about  
18 unpublished books be produced, especially given that  
19 these books are not named in the complaint, they're not  
20 alleged to infringe, they can't infringe because they  
21 haven't been published yet, and the plaintiff doesn't  
22 seek to enjoin their production.

23 THE COURT: Mr. Passin.

24 MR. PASSIN: Well, as far as we haven't alleged  
25 they infringe, you know, like I said, if they use the

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same characters, they do infringe in my opinion. And if we move to enjoin, we'll move to enjoin those as well. We'd enjoin any books that contain any of the material.

THE COURT: Okay, well, certainly if you are able to establish that characters in books one through four are infringing, then presumptively the same characters appearing in books five and six will also be found as such. So for purposes of discovery in this copyright case, I don't think that there is a need to access these documents at this time, and I do think on the other side there is significant prejudice and burden to the defendants to produce them, again, without much upside to you given that these books haven't even been published.

I do think, if the plaintiff is able to prevail in her case, that, you know, these other, you know, books five and six may either be folded into this litigation or revenue that is obtained from those later published books may be, you know, fair game for the plaintiff now. So I'm going to deny the request for discovery into these books, but that doesn't mean that if plaintiff is able to establish infringement, that those books are off limits in this litigation. Understood?

MR. PASSIN: Thank you, Your Honor.

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2 THE COURT: Okay. I think the last issue here

3 I can dispense with easily which is the request to search

4 the parties' computers. Unless there is a very clear

5 evidence of misconduct or that the lawyers are

6 misrepresenting to the Court, I don't typically allow

7 discovery on discovery which searching somebody's

8 computer would constitute. So I'm going to deny that

9 request as improper.

10 MR. PASSIN: Thank you, Your Honor.

11 THE COURT: Any other issues, Mr. Passin, that

12 you want me to raise? (indiscernible)

13 MR. PASSIN: Well, first off, let me just point

14 out we still have some problems because, you know, I just

15 got a letter last Friday from Ms. Wolf telling me for the

16 first time that her client's going to be on a book tour

17 most of October in Europe; therefore, she can either sit

18 for a deposition in September which doesn't make sense

19 and I don't have these documents or early November which

20 is after the cutoff --

21 THE COURT: Right --

22 MR. PASSIN: And then I'm also --

23 THE COURT: -- sorry, I meant to talk about

24 this. Before we move to the schedule, thank you for

25 bringing that up, and I would've been remiss not to

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address that. Besides the schedule, anything else you want to address?

MR. PASSIN: Well, and then I also got a letter I'm concerned about, yeah, we got documents from Mr. Koonce, but I sent him an email, him and Nancy Wolf an email yesterday pointing out that our vendor discovered an issue where commas as being used as multiple vowel separators for the correspondence fields. Please provide an updated data file for the volumes with a different unique special character that properly separates the data in (indiscernible). In addition, please provide two additional headers, a creation date, and modified date field (indiscernible) update data files. And they also pointed out something wrong with the metadata of Ms. Wolf's production.

And Mr. Koonce told me, you know, he's trying to sound very cooperative now, but he told me, and this is typical, that he won't answer my questions. Mr. Koonce said I won't answer the question because he claims that I haven't answered his pending question which is what process plaintiff is following to identify and produce documents. Well, if plaintiff is not using search terms to do so, okay, quite frankly, ever since I sent Your Honor my two letters, Mr. Koonce has been trying to pick



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a fight with me. I told him twice that we're going to gather and produce the responsive documents we said we would produce. We're gathering and producing. We're not going to use search terms. We're going to go through all the files and we're going to produce what's responsive.

There's nothing more I can say. I don't know what else to say, yet he keeps on asking me the same question, and now he's refusing (inaudible) to produce, but they haven't produced because they don't have the right metadata, and he's refusing to correct it or even answer my questions.

MR. KOONCE: May I speak to this, Your Honor?

THE COURT: Sure.

MR. KOONCE: So starting with the first, the second issue or the issue about the metadata, in my response to Mr. Passin who raised this literally yesterday, I did first address the fact that he refuses to answer very direct questions from us about their production which has not yet happened, but at the end of that email, if you'll look at it, I then said we don't follow what you're asking for with respect to the supposedly missing metadata. And when we can turn to that issue, he's going to need to provide a better explanation because the explanation he just gave on the

1  
2 call today as well, I just don't, we just don't follow  
3 what they need. So we're just going to need more  
4 detailed information.

5 I did say to him that we don't want to start  
6 engaging - he has asked, you know, many, many, many  
7 questions about our production over time. I sent him a  
8 list in that email last night of eight to ten questions  
9 with specifics he's asked. I have tried every time to  
10 respond thoroughly, and if I have an answer for him, I  
11 give it to him and straightforwardly. It's exactly the  
12 way we approached the search term issue. And the only  
13 question we have asked him, since this production hasn't  
14 been made yet, is simply if you're not using search  
15 terms, Mr. Passin, how are you going about producing  
16 documents because presumably Ms. Freeman, that we know  
17 from our side of documents at least with Prospect Agency  
18 is there's a lot of emails and a lot of documents.

19 So maybe they are going through one by one and  
20 maybe Mr. Passin and his law firm and his lawyers are  
21 doing that, but he's refused to even answer that simple  
22 question, and we just feel like if this is going to be a  
23 one-way street in discovery where we raise things he  
24 doesn't answer and then he continues to shoot questions  
25 at us about our production, that's not a productive way

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to go.

THE COURT: All right, let me ask a question with respect to the electronic production. Is it possible to have a vendor to vendor conversation so that the people who speak the language can have a discussion about where the problem lies?

MR. PASSIN: That's fine with me, Your Honor. It's Mark Passin.

MR. KOONCE: That's fine on our end too. And I'm sure that's where we would've gotten, Your Honor, if we had continued this discussion in a meet and confer as opposed to it being raised today prematurely.

THE COURT: Okay, so let's make sure that that happens as soon as possible so that whatever technical problem can be addressed so that the production can be utilized.

MR. PASSIN: Your Honor, let me finish my answer to your question. Let me just look at my list of open items for today, if you can bear with me a minute.

THE COURT: Sure, I do want to raise the issue that Mr. Koonce raised though. I do want to discuss that --

MR. PASSIN: Go ahead.

THE COURT: -- before I turn back to you, Mr.

1  
2 Passin, for other things on your list. You know, my  
3 understanding is that you've produced I think 17  
4 documents which seems like a surprisingly small number of  
5 documents for a case like this. I assume that your  
6 client used email herself, and those emails need to be  
7 properly searched. Can you report to the Court how you  
8 are searching for responsive documents?

9 MR. PASSIN: Sure. First of all, Your Honor, I  
10 want to point out that we just served our documents on  
11 August I think it's 22, and we're in the process of  
12 gathering documents now. My client is a lawyer, and  
13 she's going through every email and given me every - and,  
14 by the way, they served 150 document request on us, okay.  
15 So she's going through every email and sending us every  
16 document response. She's a lawyer, a family lawyer,  
17 she's a litigator, and she's pulling all the documents.

18 MR. KOONCE: Your Honor, it's - sorry, Your  
19 Honor, I'm interrupting.

20 THE COURT: All right, I'm not sure it's  
21 appropriate for the client to be reviewing the documents.  
22 I appreciate that she may be a lawyer, but a family law  
23 lawyer is not a copyright lawyer, and she may be not in  
24 bad faith but because of her lack of expertise may not  
25 appreciate what kind of document would be responsive. I

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2 mean she is the immediate witness in this case. I think

3 the better course needs to be that you get her email,

4 that it's copied over to you, or at a minimum that you

5 provide the search terms that she needs to do. But I

6 think we can't rely on her to individually open her email

7 and select documents that she thinks are responsive.

8 MR. PASSIN: She has to turn her whole email

9 box over to me?

10 THE COURT: Or to a vendor and you and the

11 defendants need to identify appropriate search terms.

12 MR. PASSIN: Well, first, I think even they

13 called out, I mean I don't think she should just give me

14 every email that she's ever sent during the ten years.

15 THE COURT: Excuse me?

16 MR. PASSIN: You're saying she has to send me,

17 give me every email she's sent over ten years?

18 THE COURT: Well, you brought this case, so you

19 have an opinion about when this copying may have

20 happened, when the opportunity for it to have happened

21 exists. So if that's 2010, then, yes, that would be when

22 we start searching.

23 I mean, look, the defendants are entitled to

24 know maybe your client shared her manuscript with her

25 first cousin and maybe that first cousin then slipped to

1 PROCEEDINGS 38

2 a friend and that may explain what's going on here, or  
3 not, I have no idea. But I don't think it's appropriate  
4 for the plaintiff to decide what documents are  
5 responsive. And then to your point about the large  
6 number of document requests, without making comments  
7 about whether that number's the right number or not, it  
8 is a lot of document requests, and I'm not sure I would  
9 feel confident independently going through all of my  
10 emails and making sure I'm responding to each and every  
11 document demand. That's a lot to keep in your mind.

12 And that's why, like I said at the beginning of  
13 this conference, that's why using technology as your  
14 friend, using search terms is much more effective than  
15 relying on the human to just determine independently  
16 whether a document is responsive or not.

17 MR. PASSIN: All right, well, then I'll talk to  
18 her and may have to do search terms.

19 THE COURT: Okay, I think that's where we're  
20 headed, and I'll direct that you report back to the  
21 defendants next week because --

22 MR. PASSIN: Your Honor --

23 (interposing)

24 MR. PASSIN: -- could I have a little more - I  
25 hate to bring this up, but my client in the past had, I

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2 had to put this on the record, but had breast cancer, and

3 at the end of last week they just found a mass, and she's

4 been going to doctors this week. So it may take a little

5 longer, but it'll be quick.

6 THE COURT: Okay. Well, I certainly hope that

7 everything is quickly resolved on her, in her health.

8 I'm sorry to hear that. You may pass along my regards to

9 her. So if you can, you know, I think that deadline of

10 substantial production of all document discovery would

11 apply to you as well, so if you can get back to plaintiff

12 --

13 MR. PASSIN: Your Honor, I got my request about

14 seven weeks after (indiscernible).

15 THE COURT: Okay.

16 MR. PASSIN: Or five weeks after this. So

17 should I get more time?

18 THE COURT: Do you need more time? It seems to

19 me --

20 MR. PASSIN: Yes.

21 THE COURT: -- you know, you got three more

22 weeks here.

23 MR. PASSIN: Yes, we need more time.

24 THE COURT: When do you think you can have

25 substantial production of documents?

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2 MR. PASSIN: How about October 21.

3 MR. HALPERIN: Your Honor, this is Ben  
4 Halperin, may I just be heard on that point briefly?

5 THE COURT: Sure.

6 MR. HALPERIN: Thank you, Your Honor. We  
7 served our document requests on July 15, and we have far  
8 more custodians to search than plaintiff. I don't think  
9 plaintiff should unilaterally get an extension here.

10 THE COURT: Other than the plaintiff what other  
11 custodians are you searching, Mr. Passin?

12 MR. PASSIN: Her husband as well.

13 THE COURT: So it's two custodians. Yes?

14 MR. PASSIN: Yes.

15 THE COURT: And are you disputing that you  
16 received document requests on July 15?

17 MR. PASSIN: No, I'm not, I'm sorry, July 15 it  
18 was, that's correct.

19 THE COURT: Okay, so that's --

20 (interposing)

21 MR. PASSIN: So it was, I guess about five  
22 weeks after.

23 THE COURT: Okay, regardless of how later from  
24 when you served discovery, that's eight weeks ago which  
25 means your responses are four weeks late.



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MR. PASSIN: All right.

THE COURT: I think we should set a substantial completion of document discovery of October 7. If, Mr. Passin, because of your client's circumstances you cannot complete all of that, meaning you cannot have substantial production, you should have, you should be well on your way. And certainly with respect to this issue about how you're going to be searching documents, there needs to be clarity on that point as well.

So I'll direct that you get back to the defendants no later than September 28 on how you're conducting your search for documents. If in advance of that the defendants want to propose search terms that they think would capture the types of material that they're looking for based on their own document demands, you should present that to the plaintiffs. Okay?

MR. PASSIN: And then I hate to point this out too, but I never go on a vacation and I'm on vacation for about four days, September I think it's 24<sup>th</sup> to 28<sup>th</sup>. My wife's 65<sup>th</sup> birthday, and I'd hate to cancel.

THE COURT: Of course. I am a judge but I'm also a human being. Okay, so can you get back to the, get back to the defendants by the 30<sup>th</sup>, that Friday?

MR. PASSIN: Yes, and can I have until the 14<sup>th</sup>

1  
2 to produce?

3 THE COURT: Fine.

4 MR. PASSIN: Thank you.

5 MR. HALPERIN: Your Honor, this is Ben  
6 Halperin. If plaintiff is going to get till the 14<sup>th</sup>, can  
7 we, can all parties just have to the 14<sup>th</sup> to keep it nice  
8 and clean?

9 THE COURT: I'm not sure I would call this case  
10 nice and clean.

11 MR. HALPERIN: Fair enough.

12 THE COURT: Okay, so by September 30 I want the  
13 plaintiff to have advised the defendants how he is  
14 conducting his search for responsive documents. The  
15 plaintiff herself is not competent to do that, and I mean  
16 that not because she's not a competent person but because  
17 she is a party to this litigation, she is not an expert  
18 in copyright law. So she is not the person who should be  
19 going through documents. If you, Mr. Passin, or your  
20 colleagues in this case or co-counsel. So certainly by  
21 September 30 you need to advise the defendants how you  
22 are searching for documents.

23 To the extent that search terms are the  
24 preferred method, which I suspect they probably are,  
25 there's nothing that stop the defendants between now and

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then from proposing terms so that the plaintiff can maybe even consider those terms in advance of their deadline of September 30 to get back to you. And if the parties --

MR. PASSIN: I suggest they do that if they could.

THE COURT: Okay. So if the defendants can do that, propose search terms, I recognize today is the 15<sup>th</sup>, and by the 23<sup>rd</sup>. After that Mr. Passin is not going to be available. So the sooner you can get those search terms or Mr. Passin, the better.

MR. HALPERIN: Understood, Your Honor.

THE COURT: All right, we'll put the deadline for the substantial completion of document discovery at October 14.

MR. KOONCE: Thanks, Your Honor.

THE COURT: I'm going to then ask for a status letter from the parties. Why don't I get a status letter from the parties on October 21. So we can just check in and see how things are going then. Hopefully we will have everything squared away such that we can being taking depositions in November. It sounds like some people may be away in October, so that works for everybody. And I will extend the discovery deadline until the end of the year. That'll give the parties two

1 months to complete any depositions.

2 MR. PASSIN: Your Honor, then the other date  
3 that have to be moved is obviously deadline to complete  
4 depos yet. Deadline for requests to admit. Can we work  
5 that out ourselves?  
6

7 THE COURT: Yes.

8 MR. PASSIN: And then expert discovery  
9 deadline, that's currently December 9.

10 THE COURT: So we'll move that into 2023. What  
11 sort of experts are parties anticipating?

12 MR. PASSIN: This is Mark Passin. We  
13 anticipate having two experts on various copyright  
14 issues, probably an expert on damages.

15 THE COURT: Two copyright experts and one  
16 damages expert?

17 MR. PASSIN: Yes.

18 MR. HALPERIN: Your Honor, this is Ben  
19 Halperin. May I answer one if you're done?

20 THE COURT: Sure.

21 MR. HALPERIN: Thank you. We don't believe  
22 that experts are needed at all on copyright issues in  
23 this case. These are young adult works that can easily  
24 be compared. So, well, easily is an open question due to  
25 the issues we raised about it being unclear which

manuscript plaintiff is really suing over, but they're not scientific material that need to be parsed by experts. They can be compared by the Court, and if summary judgment is appropriate, they can be compared by the jury. It's possible if we get damages, that financial experts might be needed, but we're a long way from there. So that's our position on experts.

THE COURT: So I'm going to set a deadline for expert discovery in the early part of 2023. I asked what sort of experts were contemplated because it wasn't obvious to me that there would be a need for experts. I'm not prepared to preclude the plaintiff right now from engaging experts, and I don't know that I would necessarily preclude the process. Obviously the defendants would be open to making a motion to preclude the witness from testifying, but I think we can just table that issue for now with the recognition that experts are incredibly expensive, and whether or not that's really a necessary and appropriate use of resources I think maybe remains to be seen. But I'll set a deadline now for expert discovery. I don't think I could bar the plaintiff from seeking an expert if that was his intention.

MR. HALPERIN: Thanks, Your Honor.

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THE COURT: All right, maybe if my last comment is a --

(interposing)

MR. PASSIN: Wait, wait, wait, what is the deadline for expert discovery?

THE COURT: I'll work it out in the schedule, but it'll be roughly 30 days from the close of fact discovery will be the reports and then rebuttal reports, you know, three weeks or so thereafter and then a period of time for depositions.

MR. PASSIN: Thank you, Your Honor.

THE COURT: Okay, anything further?

MR. PASSIN: No, Your Honor.

MR. HALPERIN: Your Honor, this is Ben Halperin again. I would like just an opportunity to be heard on the issue of the lack of clarity as to which manuscript is at issue. But if the Court has other topics first, I'm happy to wait.

THE COURT: No, that's fine, go ahead.

MR. HALPERIN: Okay, so I mean this is a case that should be decided substantial similarity. Unfortunately, there's not a case where there's a published book that we could easily compare the Crave series against. It's a vague collection of unpublished

manuscripts, and understanding that when an author writes a manuscript, the editing process happens and things change. What's preventing potentially a dispositive motion right now is that, one, the plaintiff hasn't sent us all versions of the manuscripts, and it's completely unclear which version the plaintiff believes was infringed. The plaintiff has said that the allegedly infringed manuscripts were reflected in copyright registrations, but there are 16 manuscripts in those registrations.

Plaintiff has also stated in interrogatory responses that it's clear from the complaint which version of the manuscripts has been infringed, but it's not at all. No specific manuscripts were provided with the first amended complaint, and none are directly cited in it.

So one way or another we are chopping at the bit to move for summary judgment on substantial similarity because we're confident that once the Court reviews these actual works at issue, it's going to find that there's just basis at all to believe that they're substantially similar. But what's holding that up is the point of comparison on the plaintiff's side.

So what I would propose on this is any way to

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2 get to an agreement that the manuscripts identified in  
3 our letter which is the one that Ms. Kim sent to an  
4 editor at Entangled in October 2013 be used as the point  
5 of comparison so that we can go ahead and assemble our  
6 motion for partial summary judgment on substantial  
7 similarity. But what we don't want to happen is to  
8 through that entire process and then to have plaintiff  
9 come back and say, whoa whoa whoa, you're using the wrong  
10 manuscript here and just have a bunch of wasted effort.  
11 And we don't want the Court to have to sift through 16  
12 different version of manuscripts too to decide the  
13 motion.

14 THE COURT: Mr. Passin.

15 MR. PASSIN: First of all, that's very  
16 disingenuous. They know that version is not the version  
17 that we claim. It's the copyrighted versions. And they  
18 took bits and pieces of various versions. That's why we  
19 think it's appropriate for copyright experts because it  
20 is akin to something scientific. It would be very  
21 complicated for a jury to read all the different versions  
22 and piece it all together.

23 THE COURT: Okay, I do think you need to  
24 identify with clarity even if you're suggesting that they  
25 copied multiple versions, you do need to provide with



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2 clarity those manuscripts as well as the date in which it

3 was published. I know not, I don't mean published in the

4 public sense but published to someone other than the

5 author. The defendants have a right to know what it is

6 that you are alleging was copied.

7 MR. PASSIN: I understand, and - I understand.

8 THE COURT: Okay.

9 MR. PASSIN: I understand.

10 THE COURT: By that deadline of October 14 you

11 need to identify with specificity which manuscript or

12 manuscripts you believe were infringed and provide the

13 relevant metadata so that the defendants can see when

14 those documents were published. Okay?

15 MR. PASSIN: Okay. Yes.

16 THE COURT: All right. Anything further from

17 any side?

18 MR. HALPERIN: Your Honor, Ben Halperin one

19 more time. I mean I would just empathize that, you know,

20 substantial similarity is going to be potentially

21 dispositive, and the parties could save a whole lot of

22 time and money if that issue could just be briefed as

23 soon as possible. So we did ask for a stay of discovery

24 so that process could happen in our letter. I take it

25 from Your Honor's comments that you want discovery to

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2 proceed, but I do want to ask for that stay now.

3 THE COURT: Understood. I'm going to reject  
4 that request. I appreciate the interest. It's also not  
5 clear to me, you've been saying partial motion for  
6 summary judgment. I don't know exactly what --

7 MR. HALPERIN: Yes. Thank you, Your Honor, and  
8 I'm sorry to interrupt. Let me clarify that. So  
9 plaintiff needs to essentially to prove two things to  
10 prevail. One is substantial similarity and the other is  
11 defendants' access to her manuscripts, and we understand  
12 that access is something that has to be vetted at  
13 depositions. So we would not move on that issue yet, but  
14 we do think that substantial similarity, as is the case  
15 in, you know, most literary infringement cases where you  
16 can decide on a motion to dismiss before discovery, that  
17 can be decided now just as soon as we figure out what  
18 plaintiff's work is.

19 THE COURT: Okay, one thing I can say with  
20 certainty is the parties are not having serial motions.  
21 So you will have an opportunity to file a motion for  
22 summary judgment. Maybe that motion will be for partial  
23 summary judgment, maybe it'll be for total summary  
24 judgment, but I'm not going to allow the parties,  
25 entirely inefficient from the Court's perspective, to

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allow the parties to file a motion for summary judgment on one element, and if that motion is not granted, then for the parties to file a second motion on another element. So that is a non-starter from my perspective.

MR. HALPERIN: Okay, we accept that, Your Honor, thank you.

THE COURT: Okay. If you think that you would file a motion and not file a second one, you're welcome to make an application at the appropriate time, but I'm absolutely not entertaining serial motions for summary judgment.

MR. HALPERIN: And just to clarify, so the Court would like us, if we want to move for summary judgment on access and substantial similarity, the Court is directing us to do that in one motion at the end of discovery?

THE COURT: Correct.

MR. HALPERIN: Thanks, Your Honor.

THE COURT: All right, a segway from spending a lot of money and time on a litigation is talking about settlement. I've heard the defendants take strong positions about the merits of this case, but sometimes there's also a business calculation in thinking about settlement. Have the parties had any settlement

1 discussions to date?

2 MR. PASSIN: No.

3 THE COURT: Does anyone think having a  
4 settlement conference with me would be productive?

5 MR. PASSIN: Well, the plaintiffs are always  
6 open, but I don't know about the defendants.

7 MR. HALPERIN: Ben Halperin here, Your Honor.  
8 Respectfully, not at this juncture given the issues we  
9 raised about substantial similarity and access.

10 THE COURT: All right, let me just tell you a  
11 bit about my calendar. If you asked me today to come in  
12 for the absolute soonest I could see you for a settlement  
13 conference, I would give you a date in the middle of  
14 November. Which means if you ask me in mid-October, I'll  
15 probably give you a date in January. So if you think  
16 there might be a time where a settlement conference would  
17 be productive, maybe after you've reviewed the discovery  
18 but before you've taken all of the depositions, it would  
19 be in your interests to get on my calendar now. I don't  
20 mind you cancelling a settlement conference at the last  
21 minute because you think it would not be productive, but  
22 I won't be able to fit you in if you ask for it with some  
23 urgency. And I won't extend litigation deadlines to  
24 accommodate late requests.  
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So we don't need to do anything now. If you want to schedule a settlement conference, just email my chambers or call my deputy, and she can help you do that. But I would rather you get on my calendar if there's any opportunity for settlement. Given that I'm not going to permit the defendants to make serial motions for summary judgment, it does mean that the parties are going to have to pay for the rest of document discovery, deposition costs, potentially rebuttal expert costs, and then the motion for summary judgment before the case is potentially resolved in the defendants' favor, and, of course, if the motion's not granted, the case will move forward to trial.

So I hope that the defendants will speak with their clients. Has the plaintiff made a demand yet?

MR. PASSIN: No, because we don't know anything about profits.

THE COURT: Okay. Well, I think when you're able to make a demand, you should so that the defense lawyers at least have something to take back to their clients, and then the parties can have a serious conversation about whether settlement makes sense at this point. And, again, just keep in mind my schedule because it's usually about eight weeks from when you ask that I

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can see you.

MR. PASSIN: Thank you very much, Your Honor.

THE COURT: Okay. All right, everybody, thank  
you very much. We're adjourned.

MR. HALPERIN: Thank you.

MR. KOONCE: Thank you, Your Honor.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Freeman versus Deebbs-Elkenaney, et al., Docket #22cv2435, was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

Signature Carole Ludwig

CAROLE LUDWIG

Date: November 17, 2022